



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 14, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0176

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 – Standards and Duties. 11. Employees Shall be Truthful and Complete in All Communication (Ruses, when appropriate)	Not Sustained (Unfounded)
# 2	8.300-POL-12 Firearms. 5. An Officer May Draw their Firearm in the Line of Duty...	Sustained
# 3	5.140 – Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 4	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Sustained

Imposed Discipline

Suspension Without Pay

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The Complainant alleged that the Named Employee violated several Department policies when he pretended to find a firearm while searching the Subject's vehicle.

SUMMARY OF INVESTIGATION:

Named Employee #1 (NE#1) and other officers conducted a traffic stop. The vehicle stopped was connected to a report of a person shooting a firearm in the air. The vehicle matched elements of the description provided. The officers conducted a high-risk felony stop, which involved ordering the Subject out of the vehicle while the officers had their firearms drawn. The Subject was placed into handcuffs. The officers determined that there were no other occupants of the vehicle. NE#1 told the Subject about the report of shots being fired and the vehicle potentially matching the description. The Subject was asked if he would consent to a search of the vehicle, and he agreed to do so. He was provided with *Ferrier* warnings, a legally required set of warnings concerning the scope of the search and the fact that it could be terminated at any time in the Subject's discretion. The search was conducted without locating any firearms, ammunition, or shell casings.

During the search, NE#1's Body Worn Video (BWV) captured him saying "uh oh" twice while lifting up a black handgun. He showed the handgun to the Subject and the other officers. NE#1 quickly stated: "It's my gun, I'm just kidding. I'm just joking." Another officer stated: "I almost put it out over the air you recovered a gun."



He said that the vehicle was “clear,” and told the Subject: ““That was my gun. I’m messing with you, dude.” He thanked the Subject for being cooperative. While removing the Subject’s handcuffs, he said: “I couldn’t help myself.” He again thanked the Subject for being cooperative and said: “sorry for that.”

When the Subject had walked away, NE#1 said to another officer: “I’m playing a little bit too much with the...with the gun thing though, huh.” The other officer responded: “Probably.” An Acting Sergeant responded to the scene to screen the incident. The Acting Sergeant spoke with the Subject and provided him an SPD business card with the incident number. The Subject did not make any complaints to the Acting Sergeant or others. He further did not assert that NE#1’s treatment of him was based on bias. NE#1 did not disclose what had occurred to the Acting Sergeant while they were at the scene.

Later, while at the Southwest Precinct, another officer – referred to here as Witness Officer #1 (WO#1) – reported what NE#1 had said and done to the Acting Sergeant. NE#1 also self-reported. The Acting Sergeant consulted with a Lieutenant, and they made the determination to counsel NE#1 and document that counseling in the Performance Appraisal System. However, after learning of what occurred, the Southwest Precinct Captain identified that NE#1 may have engaged in serious misconduct that required an OPA referral. The Captain sent the case to OPA and this investigation was initiated.

As part of its investigation, OPA reviewed the BWV, In-Car Video, and documentation concerning the underlying crime and the vehicle description. OPA further interviewed NE#1 and WO#1.

WO#1 told OPA that he remembered the stop in question. He said that the Subject was calm and cooperative. The Subject consented to a search, but no guns were located. He recalled NE#1 also searching the car and he heard NE#1 say that he found a gun and saw him holding it up. WO#1 was surprised by this as the Subject told them that he did not have a gun. Seconds later, NE#1 said that he was joking. WO#1 could not recall any specific reaction from the Subject. WO#1 told OPA that he did not know why NE#1 did this and that it was not something he would have done. He did not discuss what occurred with NE#1, but he reported the incident to the Acting Sergeant.

NE#1 also recalled the incident. He acknowledged pretending that he had found a gun in the vehicle. He told OPA the following: “I made a very regrettable and stupid joke. And, forgot that I was dealing with a citizen who was being detained instead of just other officers, ah. And it was, I immediately regretted it.” NE#1 further explained that everyone at the scene was involved in a tense situation that: “I regrettably was trying to uhm, relieve some of that tension by making a joke which after the fact I realized was very irresponsible and stupid. And that was it.” NE#1 told OPA that, while previously employed as a police officer in Detroit, a senior officer had played the same joke on him. However, he recognized that, during the prior incident, a community member was not present.

NE#1 admitted that, at the time he held up his handgun and pretended that he found it in the vehicle, there were no exigent circumstances or dangers permitting him to draw the handgun from its holster. He confirmed that his conduct was unprofessional, and he noted multiple ways in which his actions diminished public trust and confidence in him and the Department. NE#1 denied that he was lying to the Subject and he reiterated that he just made a stupid joke.

Ultimately, NE#1 apologized for what he did and said that he would never repeat that behavior.

ANALYSIS AND CONCLUSIONS:



Named Employee #1 – Allegation #1

5.001 – Standards and Duties. 11. Employees Shall be Truthful and Complete in All Communication (Ruses, when appropriate)

SPD Policy 5.001-POL-11 states that Department employees shall be truthful and complete in all communication. Relevant to this case, the policy also governs when ruses are appropriate. Specifically, the policy states that: “Employees may use deception for a specific and lawful purpose in certain circumstances, when: (1) There is an exigent threat to life safety or public safety; (2) It is necessary due to the nature of the employee's assignment; and/or (3) There is a need to acquire information for a criminal investigation.”

If NE#1’s statement to the Subject constituted a ruse, it would have been impermissible under all of the prongs of the policy. First, there was no exigent threat to life safety or public safety. Second, it was not necessary based on NE#1’s assignment as a patrol officer. Third, it cannot be said that NE#1 had a specific need to acquire information for a criminal investigation as he had already obtained consent to search the vehicle and the Subject was cooperative.

However, OPA ultimately concludes that this was an ill-advised and unprofessional comment, as NE#1 admitted, not a ruse. This conclusion is based primarily on a review of the BWV and, specifically, the amount of time that elapsed from the statement being made to NE#1 stating that it was a joke – from OPA’s assessment, two seconds. Given NE#1’s virtually immediate clarification that he made a joke, rather than him waiting for the Subject to respond and potentially admit that he had contraband in the car, OPA finds that it was not a ruse as contemplated by policy.

This decision should not be construed as diminishing the severity of what NE#1 said and did; however, it is a recognition that his misconduct is better addressed in the context of Allegation #2 and Allegation #4, which more accurately govern his behavior.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

Named Employee #1 – Allegation #2

8.300-POL-12 Firearms. 5. An Officer May Draw their Firearm in the Line of Duty...

SPD Policy 8.300-POL-12 governs officers’ use of firearms while in the line of duty. The policy states that: “An officer may draw their firearm in the line of duty when the officer reasonably believes it may be necessary for his or her own safety or for the safety of others.” The policy further provides that: “Officers will not draw their firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with policy on the use of firearms.”

Here, NE#1 drew his handgun, held it up, and jokingly pretended to have found it in the Subject’s vehicle. However, under the circumstances of this case, he had no right to draw his weapon in the first place. It was not necessary to do so for NE#1’s safety or the safety of others. In addition, there were no facts present that would have created a reasonable belief that a firearm would be needed or authorized. To the contrary, this was exactly the type of situation where NE#1 should not have drawn his weapon and, as such, OPA finds that he clearly violated policy.

For these reasons, OPA recommends that this allegation be Sustained.



Recommended Finding: **Sustained**

Named Employee #1 – Allegation #3

5.140 – Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

SPD policy prohibits biased policing, which it defines as “the different treatment of any person by officers motivated by any characteristic of protected classes under state, federal, and local laws as well other discernible personal characteristics of an individual.” (SPD Policy 5.140.) This includes different treatment based on the race of the subject. (*See id.*)

During his OPA interview, NE#1 denied that his decision to make the statement about finding the handgun was not influenced by the Subject’s race. He said that he did not act based on bias but, instead, made a misguided joke.

OPA finds insufficient evidence to establish bias. OPA believes it more likely, as NE#1 asserted, that it was a serious lapse of judgment that had nothing to do with the Subject’s race. That being said, the optics of White officers joking about finding a handgun in the vehicle of a Black man standing there in handcuffs cannot be ignored. However, OPA finds that this goes to NE#1’s unprofessionalism and is not, in and of itself, sufficient to establish that biased policing occurred.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

Named Employee #1 – Allegation #4

5.001 – Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-10.) The policy further states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.”

Whether NE#1 violated SPD’s professionalism policy is simply not in question. He admits doing so and OPA believes it abundantly clear that this is the case. Indeed, OPA finds that NE#1 exercised stunningly poor judgment. His joke was totally inappropriate, and his conduct and statements were disrespectful to the Subject, who did not deserve to be subjected to this. While OPA appreciates that NE#1 self-reported, recognized that what he did was wrong, and expressed embarrassment for his actions, OPA views this as a significant violation of this policy, and one that serves to substantially undermine public trust and confidence in NE#1 and the Department.

For these reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**